Nos. 93-1456 & 93-1828

In The

Supreme Court of the United States

October Term, 1994

U.S. Term Limits, Inc., Arkansas For Governmental Reform, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumleg,

Petitioners,

vs.

Ray Thornton, Blanche Lambert, Dale Bumpers, David Pryor, et al.,

Respondents.

State of Arkansas ex rel. Winston Bryant, Attorney General of the State of Arkansas,

Petitioner,

vs.

Bobbie E. Hill, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF THE STATES OF NEBRASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, KANSAS, KENTUCKY, MASSACHUSETTS, MONTANA, NEW HAMPSHIRE, OHIO, SOUTH DAKOTA, TENNESSEE AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Ninth and Tenth Amendments and the Guarantee Clause preserve the ability of the people of the States to enact election provisions denying ballot access to multi-term Congressional incumbents.

2. Does Article I of the Constitution forbid a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate?

3. Whether a state has the power under the Elections Clause of the Constitution, Art. I § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in the manner of Amendment 73 to the Arkansas Constitution, or whether the Qualifications Clauses of the Constitution, Art. I § 2, and § 3, prohibit a state from imposing such a ballot access restriction.

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INTEREST OF AMICI CURIAE

The Petitioner, State of Arkansas, through its Attorney General, Winston Bryant, is asking the Court to affirm the Constitutionality of an amendment to its State Constitution – enacted through popular initiative by the state's voters – which restricts an incumbent member of Congress' access to the printed ballot after serving a specified number of terms in office. ***See*** Ark. Const. amend. 73 (Appendix at pp. 2-4). Arkansas' provision is not unique. Since 1990, 15 states have passed various ballot access restrictions or term limits for members of Congress – all through citizen initiative.[1] (These fifteen State laws are set forth in their entirety in an Appendix submitted to the Court with this brief of the amici curiae States.). Similar measures are expected to be on the ballots in as many as seven additional states in 1994, and on the ballot in at least one more state in 1995.[2]

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[1] See Ariz. Const. art. VII, § 18 (West Supp. 1993); Ark. Const. amend. 73 (Michie Supp. 1993); Cal. Elec. Code § 25003 (West Supp. 1994); Colo. Const. art. XVIII, § 9a (West Supp. 1993); Fla. Const. art. 6, § 4 (West Supp. 1994); Mich. Const. art. II, § 10 (Michie Supp. 1994); Mo. Const. art. III, § 45(a) (West Supp. 1994); Mont. Const. art. IV, § 8 (1993); Neb. Const. art. XV, § 20 (Supp. 1993); N.D. Cent. Code §§ 16.1-01-13, 16.1-01-13.1, 16.1-01-14 (Michie Supp. 1993); Ohio Const. art. V, § 8 (Supp. 1993); Ore. Const. art. II, § 20 (1993); S.D. Const. art. III, § 32 (Michie Supp. 1994); Wash. Rev. Code §§ 29.68.015-016 (West Supp. 1994); Wyo. Stat. § 22-5-104 (Michie Supp. 1993). No state *legislature* has passed a congressional term limits law, although both South Dakota and Utah have passed resolutions calling for a constitutional convention to enact a congressional term limits amendment to the U.S. Constitution. 1990 Utah Laws S.J.R. No. 24; 1989 S.D. Laws H.J.R. 1001.

[2] ***See*** Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 (1994).

The Arkansas ballot access provision has its historical antecedent in the "rotation" principle which predates the United States Constitution.[3] The principle of rotation was observed by a majority of the U.S. Congress throughout most of the Nineteenth Century.[4] However, during the Twentieth Century, a major historical shift to entrenched incumbency began to appear. Turnover rates in the House of Representatives, for example, declined from a high of 76% in 1842 to only 7.6% in 1988.[5]

As a result, the States have become increasingly concerned about the accountability of their representatives in Congress as well as the growing imbalance of power between the State and Federal governments in contravention of the Constitutional Framers' clear intent. The States and the people have focused on various incumbency restrictions as a means to address this problem. The States, including the State of Arkansas, have exercised their discretion to establish different mechanisms for attempting to reintroduce rotation. Some States, such as the Petitioner State of Arkansas, have enacted laws that restrict the ability of incumbents to have their names printed on official ballots after a specified period of time

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[3] "[I]n America . . . by the term rotation in office . . . we mean an obligation on the holder of that office to go out at a certain period." Thomas Jefferson, *quoted in* Mark P. Petracca, *Rotation in Office: The History of an Idea, in Limiting Legislative Terms* 20 (Gerald Benjamin and Michael Malbin eds., 1992).

[4] Mark P. Petracca, *Rotation in Office: The American Experience, in* 1 *Long Term View* 33, 39-42 (Winter 1992).

[5] See George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* 73-83 (1992) (tables of statistics showing that incumbent retention rates and the length of Congressional incumbency have increased dramatically).

(hereinafter "ballot access restrictions"). Others have enacted various types of limits on the number of terms a member of Congress may serve (hereinafter "term limits").

Since the November 1992 elections, court decisions in Washington and Nebraska, as well as the instant Arkansas decision, have invalidated incumbency restriction provisions.[6] The Washington decree is currently on appeal in the Ninth Circuit. Nebraska citizens have recently resubmitted petitions containing over 130,000 signatures, seeking to once again place a ballot access proposal on the November ballot.[7]

Because the determination of the validity of ballot access restrictions raises significant questions about a State's role in the election of its congressional delegation, the issue is one of vital importance to all the States and their citizens. The Amici States urge the Court to recognize the States' reserved power to enact restrictions on incumbents' access to the ballot and uphold Amendment 73.

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[6] ***See Thorsted v. Gregoire***, 841 F.Supp. 1068 (W.D.Wash. 1994); ***U.S. Term Limits, Inc. v. Hill***, 316 Ark. 251, 872 S.W.2d 349 (1994), ***cert. granted*** by ***U.S. Term Limits, Inc. v. Thornton (Ray)***, ___ S.Ct. ___, 1994 WL 101102, 62 USLW 3835 (1994), and ***cert. granted*** by ***Bryant (Winston) v. Hill (Bobbie E.)***, ___ S.Ct. ___, 1994 WL 210019, 62 USLW 3835 (1994); ***Duggan v. Beermann***, 245 Neb. 907, 515 N.W.2d 788 (1994) (decided on state law grounds only).

[7] In April, the Nebraska Supreme Court had invalidated the previous proposal on state law grounds for the lack of a sufficient number of petition signatures. ***See Duggan v. Beermann***, 245 Neb. 907, 515 N.W.2d 788 (1994).

SUMMARY OF ARGUMENT

The Constitutional text, historical evidence, and fundamental principles of federalism compel the Court to uphold State election provisions denying ballot access to multi-term congressional incumbents as legitimate exercises of State sovereignty under the Tenth Amendment and also of the rights retained by the people under the Ninth and Tenth Amendments and the Guarantee Clause.

ARGUMENT

I. STATE ELECTION PROVISIONS DENYING BALLOT ACCESS TO MULTI-TERM CONGRESSIONAL INCUMBENTS ARE A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT.

A. Introduction

These consolidated cases present the question of whether a State has the power to enact restrictions on access to the printed ballot by multi-term Congressional incumbents, or whether such restrictions are prohibited by the Qualifications Clauses of Article I, §§ 2, 3 of the Constitution of the United States. This question cannot be properly adjudicated without the careful consideration of the Tenth Amendment and its role in interpreting the Qualifications Clauses and the Election Clause.

Unlike the Tenth Amendment cases which have come before the Court in recent years, this case does not concern the scope of Congressional power or whether Congress has exceeded its enumerated powers. Rather, it concerns the reserved power of the States and the retained right of the people to control the selection of their governmental representatives. The Tenth Amendment explicitly reserves such power to the States, and to the people.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The bedrock question before the Court, then, is whether the ability of the States to enact election provisions denying ballot access to multi-term Congressional incumbents is an attribute of State sovereignty reserved by the Tenth Amendment. ***See New York v. U.S.***, 505 U.S. ___, ___, 112 S.Ct. 2408, 2417 (1992). The amici curiae States firmly believe the Constitutional text, historical evidence, and fundamental principles of federalism and republican government compel an affirmative answer.[8]

B. State Powers Under The Tenth Amendment Are Numerous And Indefinite.

The Framers of the Constitution understood the benefits of dividing power between the Federal and State

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[8] The issue before the Court is one of far reaching significance to the States. As one commentator has stated,

> How the Court decides this issue not only will reveal how it reads the Constitution, but also will indicate where it sees itself in the scheme of American politics. If the view of state power articulated in ***Gregory [v. Ashcroft***, 501 U.S. 452, 111 S.Ct. 2395 (1991)] outlines a skeleton perspective of the Court, term limitations [and ballot access restrictions] will provide a critical case for adding flesh to those bones.

Stephen J. Safranek, *Term Limitations: Do The Winds of Change Blow Unconstitutional?*, 26 Creighton.L.Rev. 321, 384-385 (1993). This case represents an important milestone in the centuries old judicial struggle to reconcile the competing demands of state sovereignty and national supremacy. ***See*** Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 Columbia L.Rev. 1 (1988).

governments, and purposely formed a system of dual sovereignty. ***See Gregory v. Ashcroft***, 501 U.S. 452, 457 (1991) (***quoting Texas v. White***, 7 Wall. 700, 725, 19 L.Ed.2d 227 (1869)). As James Madison stated, "In the Compound Republic of America . . . a *double security* arises *to the rights of the people*. The different governments will control each other, at the same time that each will be controlled by itself". *The Federalist No. 51* at 323 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).[9] To ensure this double security to the rights of the people, State sovereignty must be vigilantly guarded. As the Court stated in ***Gregory***,

> If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. at 459 (1991). This balance of power would indeed be dangerously tilted if the fundamental right of the people to choose their representatives to the Federal Congress from the respective States is construed narrowly so as to deny State control of ballot access.[10]

In essence, the Court must in this case discern the core of sovereignty retained by the States under the Tenth Amendment with respect to selection of the States' representatives to the Federal Congress. ***New York v. U.S.***, 112

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[9] This Court has, in recent years, more fully recognized the importance of Madison's "double security". ***New York v. U.S.***, 112 S.Ct. 2408 (1992); ***Gregory v. Ashcroft***, 501 U.S. 452 (1991).

[10] The Court has recognized that the Tenth Amendment demands meaningful analysis beyond the text of the Amendment itself when applied to a question of constitutional law. ***New York v. U.S.***, 112 S.Ct. at 2418.

S.Ct. at 2419. In making this discernment, the States may not be viewed as powerless entities against which all doubts should be construed in the area of sovereignty. As the Court has recognized, "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government". ***New York v. U.S.***, 112 S.Ct. at 2434.[11]

The extent of State sovereignty, even prior to its expression in the Tenth Amendment, was aptly described by James Madison:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . .

The Federalist No. 45 at 292-293 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).[12] In sum, the States retain

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[11] "The Constitution 'leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." ***New York v. U.S.***, 112 S.Ct. at 2434-2435 (quoting *The Federalist No. 39* at 245 (J. Madison) (C. Rossiter ed. 1961). While the entire constitutional scheme is designed to establish Federalism as a system of Government, the Tenth Amendment is designed to protect the States' powers and the People's rights as the ultimate source of all governmental power. Even the staunchest Federalists believed the Tenth Amendment was a device for limiting federal overreaching and guaranteeing preservation of state autonomy. ***See*** 2 *The Debates in The Several State Conventions On The Adoption Of The Federal Constitution* 131 (S. Elliott ed. 1836) (remarks by John Adams).

[12] The lack of an express provision reserving nondelegated powers to the States was, perhaps, the largest single issue in the ratification of the Constitution. Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 Akron L.Rev. 213, 214 (Summer 1991). The importance and scope of the powers reserved to the States have been discussed in cases

numerous and indefinite powers while the federal government's sovereignty "is an emanation from [the States], not a flame by which [the States] have been consumed". 5 *The Founders' Constitution* 404 (Philip B. Kurland & Ralph Lerner eds. 1987) (quoting St. George Tucker, *Blackstone's Commentaries*, 1:App. 185-87 (1803)).

C. The Tenth Amendment Must Be Applied As A Rule Of Constitutional Construction.

The Tenth Amendment must be applied as a rule of constitutional construction in analyzing whether State enacted ballot access restrictions violate the Qualifications Clauses of Article I, §§ 2 and 3.

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presenting questions much farther from the core of State sovereignty than the present case. The following relevant discussion is found in ***Garcia v. San Antonio Metropolitan Transit Authority***, 469 U.S. 528 (1985).

> In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.
>
> Much of the initial opposition to the Constitution was rooted in the fear that the National Government would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress.

Garcia, 469 U.S. 528, 568 (Powell J.; Burger C.J.; Rehnquist, J.; and O'Connor, J., dissenting).

> It is a *familiar rule of construction* of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, *this rule of interpretation is expressly declared in the tenth article of the amendments*. . . .

Collector v. Day, 78 U.S. 113, 124-25 (1870), ***overruled on other grounds*** by ***Graves v. New York ex rel. O'Keefe***, 306 U.S. 466, 486 (1939) (emphasis added). ***See also New York v. U.S.***, 112 S.Ct. at 2418.

The Tenth Amendment makes clear a fundamental tenet of the federalist plan adopted by the Framers: While the federal government is one of delegated powers, the States are presumptive holders of powers not otherwise allocated in the constitutional plan. According to the clear language of the Tenth Amendment, therefore, there are only two available choices: Is the power being exercised (1) a power delegated by the Constitution to the federal government, or (2) a power retained by the States or the people? If it is not the first, then it must be the second. Thus, the status of the States as holders of reserved powers requires that the Tenth Amendment be applied as a rule of constitutional construction in interpreting the Qualifications Clauses.[13]

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[13] ***See also*** Laurence H. Tribe, *American Constitutional Law* § 5-20 at p. 379 (2d ed. 1988).

D. The Power To Control Ballot Access And The Election Process Is Reserved To The States.

1. Application of the Tenth Amendment to the Qualifications Clauses Reveals That States Retain Power to Regulate Ballot Access.

The issue in this case compels a direct examination of the scope of State sovereignty in the foundational area of selection of the States' representatives to the Federal Congress.[14] At the heart of state sovereignty are the political processes through which the people express their will.[15]

In *Gregory*, the Court held that States must be free from external interference in the selection of state officials.

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility,

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[14] As explained above, the Tenth Amendment must be applied as a rule of constitutional construction. Ignoring the Tenth Amendment, Respondent reads the Elections Clause and Qualifications Clauses as if they encompassed the complete extent of the law on the respective topics. Such a method of interpretation is clearly prohibited by the Ninth and Tenth Amendments and ignores the fundamental fact that the federal government is one of limited delegated power.

[15] This Court has previously discussed closely related concepts.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; and it allows for innovation and experimentation in government.

Gregory, 501 U.S. at 458.

> that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, *except so far as plainly provided by the Constitution of the United States.*"

Gregory, 501 U.S. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900)) (emphasis added). The amici curiae States believe these same constitutional principles apply equally to the selection of representatives from the States to the Federal Congress. Except so far as "*plainly* provided" by the Constitution of the United States, States must be free to regulate the election process for their own representatives to Congress. U.S. Const. amend. X.

In applying the Tenth Amendment to the Qualifications Clauses, it is helpful to first consider the rotation principle as it existed at the time of the Constitution's founding. Rotation in office was widely considered to serve three primary and essential functions: (1) to check tyranny and the abuse of public power, (2) to increase opportunity for citizens to serve in public office, and (3) to enhance the accountability and the overall quality of representation in Congress.[16]

Although widely supported, rotation was not *mandated* in the Constitution. This may be so for at least three reasons: (1) the requirement of rotation had been difficult to enforce under the Articles of Confederation (which had called for the annual appointment of delegates, provided for their recall at any time, and set limits on the length of time a delegate could hold office), (2) delegates thought it unnecessary (given short terms, the doctrine of instruction, and other checks that had been built into the Constitution such as federalism and the separation of

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[16] *See* Petracca, note 3, *supra* at 26-28. *See also* definition of rotation, note 3, *supra*.

powers), and (3) the common practice of voluntary rotation in many of the states (which may have persuaded the delegates that rotation in office would be the norm in the new national government, even without an explicit constitutional requirement).[17] Moreover, convention delegates understood the Constitution to be setting forth only minimal qualifications necessary for national office. Other matters, such as rotation in office, ballot access, or term limits, were consequently left for the States to determine.[18]

Although rotation was not mandated in the Constitution, the Framers of the Constitution, as evidenced by the record of debate, clearly intended to ensure representativeness and responsiveness in those elected to the Federal "Legislature".[19] The Framers were careful to see that the States retained the power to regulate the election of the Federal Congress. U.S. Const. art. I, § 4. Furthermore, the historical record shows the overriding objective of the Framers was to establish and ensure republican principles of government, under which the people would control their rulers. The Framers, in other words, wanted to *avoid* an aristocracy, not *create* one.

The record of the Constitutional Convention clearly reveals that rather than prohibiting State enactments the Qualifications Clauses effectively removed from *Congress*

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[17] Petracca, note 3 ***supra*** at 31.

[18] Mark P. Petracca, *A New Defense of State-Imposed Congressional Term Limits, in* 26 PS: *Political Science and Politics* 700, 702 (Dec. 1993).

[19] ***See, e.g.***, Charles Warren, *The Making of the Constitution* 412-426 (1928).

the "power of regulating qualifications" for its own members.[20] If Congress had the authority to establish qualifications for its own members, said Madison, "it would vest an improper and dangerous power in the Legislature" (i.e. the Congress).[21] This reason for denying to Congress the power to set qualifications for its own members or to add to those set forth in the Qualifications Clauses, is inapplicable to the States or to the people. The proscriptions included by the Framers were intended to be exclusive only as to *Congress* (a body of limited, delegated power), and not as to the States.[22]

Comments by Thomas Jefferson support this interpretation. The Constitution, he noted, establishes "some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election". It does not, however, "prohibit to the State the power of declaring . . . any other disqualifications which its particular circumstances may call for. . . . Of course, then, by the tenth amendment, the power is reserved to the State". 2 *The Founders' Constitution* 81 (Phillip Kurland & Ralph Lerner eds. 1987) (quoting *The Works of Thomas*

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[20] Warren, note 19 ***supra*** at 422 (remarks of James Wilson). Charles Warren concludes that "[t]he elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications". ***Id.***

[21] ***Id.*** at 420. ***See also*** *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 427 (1987).

[22] ***See also*** Warren, note 19 ***supra***, at 421-422 ("the recital of these qualifications did 'by implication tie up the hands of the *Legislature* from supplying' any further qualifications") (emphasis added).

Jefferson at 379-81). Consistent with Jefferson's view, several States did, in fact, adopt additional restrictions shortly after ratification of the Constitution.[23]

This interpretation is further bolstered by the fact the Constitutional Convention of 1787 adopted the Qualifications Clauses on August 10, 1787. Yet, on August 20, 1787, the delegates still found it necessary to adopt an express provision prohibiting States from adopting a religious test as a qualification for office.[24] As only ten days had elapsed since adoption of the Qualifications Clauses, it is reasonable to assume the nature and scope of the Qualifications Clauses were well in mind at that time.[25] If the States could not regulate the selection of their Congressional representatives beyond the three enumerated areas in the Qualifications Clauses, there would be no need for a later prohibition on religious tests.

In sum, the fact that of the Constitutional Convention did not mandate "rotation" in the Constitution is of no consequence when the Constitution is properly interpreted in light of the Tenth Amendment. The Tenth Amendment demands that limitations on state power implied from textual silence are not to be favored. When the Framers wanted to restrict State power, they knew

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[23] ***See, e.g.,*** Va. Act of Nov. 20, 1788, ch. 2, § II (property and district residency requirements); Ga. Act of Jan. 23, 1789, p. 247 (district residency); N.C. Act of Dec. 16, 1789, ch. 1, § I (district residency).

[24] Charles Warren, *The Making of the Constitution* 412-426 (1928).

[25] A general principle of construction is that a legislative body is presumed to have acted with knowledge of its prior enactments. ***See, e.g., Miles v. Apex Marine Corp.,*** 498 U.S. 19, 32 (1990).

how to do so.[26] When State sovereignty was to be restricted it was set out in clear language.[27] The federal government is one of limited and delegated powers. The fact that rotation was not mandated by the Constitution in no way restricts the power of the States to enact ballot access restrictions or term limits. The proper application of the Tenth Amendment to the Qualifications Clauses strongly supports the retention of these powers by the States since the States had previously exercised them as independent sovereigns under the Articles of Confederation.[28] Ballot access restrictions on multi-term incumbent members of Congress are an expression of the people's retained rights and the States' will under their reserved sovereign powers.

2. The States Have a Significant Interest in Regulating Ballot Access Which is Protected by the Tenth Amendment.

The States have a significant interest in regulating ballot access in elections to choose their Congressional representatives. First of all, ballot access provisions enacted by the people of the States are an expression of voter choice and the popular will. The States have a significant interest in protecting and upholding the democratically expressed will of their citizens. This interest in exercising State power to protect the people's Ninth

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[26] ***See, e.g.,*** U.S. Const. art. I, § 10.

[27] ***See, e.g.,*** U.S. Const. art. I, § 4; art. I, § 8.

[28] ***See, e.g.,*** Mass. Const. of 1780, art. I, part 1; Warren note 19 ***supra,*** at 613.

Amendment retained rights is a key attribute of sovereignty embodied in the Tenth Amendment and guaranteed to the States by the Guarantee Clause.[29]

Second, the States have a significant interest in ensuring representativeness in their Congressional delegations.[30] The Framers relied on the State governments as independent sources of authority to curb any tendency on the part of the national government – including their delegates to the national Congress – toward unresponsiveness, excessive centralization, and tyrarny. *The Federalist No. 17* at 119, (A. Hamilton), *No. 46* at 298 (J. Madison) (C. Rossiter ed. 1961).

The ability of the States to fulfill their role in the constitutional framework of dual sovereignty is dependent upon their effectiveness as instruments of self-government. This requires that States maintain the confidence of their citizens, and that States have direct input in Congressional reform. It would be inconsistent with the extensive system of checks and balances embodied in the Federalist framework and the Tenth Amendment to interpret the Constitution so as to require Congress to reform itself. All constitutional amendments require *congressional* action. U.S. Const. art. V. Thus, in the area of incumbency restrictions, the remedy of a Constitutional amendment is no remedy at all since the States cannot act independently of Congress.[31]

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[29] ***See*** § II(B), (C), ***infra*** at 24-33.

[30] ***See*** Neil Gorsuch and Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State Imposed Term Limits*, 20 Hofstra L.Rev. at 377.

[31] ***See generally Baker v. Carr***, 369 U.S. 186, 193 n. 14 (1962) (noting the absence of a provision for popular initiative, in discussing the unlikelihood of legislative action to enact apportionment reform).

Finally, the States have an interest in protecting the people from overreaching by the Federal government. ***Garcia***, 469 U.S. at 551.[32] This interest is secure only when the States have control over the process of selecting their representatives to Congress. These State interests are protected by the Tenth Amendment and should be upheld by the Court.

3. Prior Case Law Supports State Control of Ballot Access.

The Court has upheld a variety of state laws restricting ballot access or prohibiting certain officials from seeking election to Congress. ***See, e.g., Storer v. Brown***, 415 U.S. 724 (1973). ***See also*** brief of Petitioner State of Arkansas at § II. Under ***Storer v. Brown***, ballot access restrictions simply do not constitute "qualifications." ***Id.***[33]

In ***Anderson v. Celebrezze***, 460 U.S. 780, 788 n.9 (1982), the Court stated, "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. . . . " The people of Arkansas, and in each State adopting ballot access restrictions, have voiced their

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[32] ***See also*** Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U.Pitt.L.Rev. 97, 149.

[33] ***See also State ex rel. O'Sullivan v. Swanson***, 127 Neb. 806, 808-810, 247 N.W. 255-256 (1934) (holding that ballot access restriction did not constitute a qualification); Gorsuch and Guzman, note 30, ***supra***, at 368 (concluding a term limit is not a qualification).

lack of support for placing multi-term incumbents on the ballot.[34]

This brief will not attempt to duplicate the Petitioners' analysis of ballot access cases. However, the amici curiae States urge the Court to read the Qualifications Clauses together with the Elections Clause, the Ninth and Tenth Amendments, and the Guarantee Clause that grant broad authority to the people of the States to select their representatives in the Federal Congress.

4. The Exercise of Sovereignty by States Over Ballot Access Is Not Without Defined Limits.

The exercise of sovereignty by the States under the Tenth Amendment over ballot access is not without defined constitutional limits. State ballot access provisions are subject to constitutional protections such as the First and Fourteenth Amendments. ***See Anderson v. Celebrezze***, 460 U.S. at 789; ***Hunter v. Erickson***, 393 U.S. 385, 392 (1969).

Congress has also expressly been delegated authority to address any perceived abuses by the States in the area of time, place and manner regulations. Article I, § 4

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[34] Further support for State control of ballot access is found in the fact that "[i]t is the State, not the federal government, that defines and restores a person's civil rights, even in regard to the federal government. The United States Constitution does not bar convicts from holding federal office. The right to vote, even in federal elections, is set by the states. The electors of both senators and representatives are determined by state law." ***U.S. v. Edwards***, 745 F.Supp. 1477, 1479 (D.Minn. 1990).

provides that "Congress may at any time by law make or alter such Regulations".[35]

II. VOTER INITIATED RESTRICTIONS THAT DENY BALLOT ACCESS TO MULTI-TERM INCUMBENTS ARE A LEGITIMATE EXERCISE OF THE RIGHTS RESERVED TO THE PEOPLE UNDER THE NINTH AND TENTH AMENDMENTS AND THE GUARANTEE CLAUSE.

Were it not for a Bill of Rights guaranteeing the viability of the States as political entities and ensuring fundamental liberties to the people, the Constitution of the United States would likely not have been ratified. ***See Garcia***, 469 U.S. at 568-69 (Powell, J., dissenting). Far from being irrelevant, the Tenth Amendment "is an essential part of the Bill of Rights". ***Id.*** at 564-65 n.8. Likewise, the Ninth Amendment is an integral part of the Bill of Rights which protects political participation and the rights of the people.[36] Similarly, the Guarantee Clause ensures the right of the people to choose their own governmental officials and adopt their own laws.[37]

All ballot access restrictions and term limits enacted by the States, including Arkansas, were citizen initiated – a factor requiring special force be given to arguments supporting their validity.[38] Such provisions which deny ballot access to multi-term incumbent Congressional candidates are a legitimate exercise of the rights reserved to

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[35] ***See also*** Hills, note 32, ***supra***, at 134-135; Merritt, note 11, ***supra***, at 54.

[36] ***See*** Hills, note 32, ***supra***, at 150 n.225.

[37] Merritt, note 8, ***supra***, at 24.

[38] ***Gregory***, 501 U.S. at 471 (noting the significance of a reform measure's approval by the people). ***See also*** Appendix for text of voter initiated provisions.

the people under the Ninth and Tenth Amendments and the Guarantee Clause.

A. The Tenth Amendment Reserves To The People Substantial Control Over The Selection Of Their Congressional Representatives.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or *to the people*." U.S. Const. amend. X (emphasis added). The protection afforded to State sovereignty by the Tenth Amendment also inures to the benefit of *individuals*.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, *federalism secures to citizens the liberties that derive from the diffusion of sovereign power.*"

New York v. U.S., 112 S.Ct. at 2431 (emphasis added) (quoting ***Coleman v. Thompson***, 111 S.Ct. 2546, 2570 (1991)) (Blackmun, J., dissenting).

The protection afforded to the fundamental liberties of the people by federalism was referred to by James Madison as "a double security" which "arises to the rights of the people". ***Gregory***, 501 U.S. at 459 (quoting *The Federalist No. 51* at 323 (J. Madison) (C. Rossiter ed. 1961). It cannot seriously be disputed that one of the most fundamental liberties in a democratic republic is the control over the selection of elected representatives. The

Tenth Amendment reserves to the people substantial control over the selection of their Congressional representatives, including the right to enact ballot access restrictions on long-term incumbents. ***See generally*** section I, ***supra***.

B. The Ninth Amendment Protects The People From Denial Or Disparagement Of Retained Rights Including The Right To Control The Selection Of Their Congressional Representatives.

This case presents a unique opportunity for the proper application of the Ninth Amendment, based on the Constitutional distinction between Ninth Amendment "rights" and Tenth Amendment "powers".

The Ninth Amendment is both complementary and supplementary to the Tenth. It provides that "[t]he enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others *retained* by the people". U.S. Const. amend. IX (emphasis added). The Tenth Amendment then provides that "[t]he *powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively, or to the people". U.S. Const. amend. X (emphasis added).

"Rights" are clearly different from "powers", but not wholly unrelated to them. "Rights" are a "justifiable title or claim to something", a "legal, equitable, or moral title or claim to the possession of . . . authority", or "[t]hat which justly accrues or falls to any one, what one may properly claim; one's due". *The Oxford English Dictionary*

(2d ed. 1989). "Power" refers to the "[a]bility to do or effect something", "[a]uthority given or committed", or "[l]egal ability, capacity or authority to act, esp. delegated authority". ***Id.***

The word "power" is used approximately 15 times on the face of the original Constitution as unamended and 11 times in the amendments to the Constitution.[39] The word "right" is not used in the unamended Constitution at all. The original draft of the Constitution as submitted to the States for ratification did not contain a Bill of *Rights*. That omission was its major defect according to the State ratifying conventions, which insisted on its inclusion as a condition for ratification.[40]

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[39] 1. "All legislative powers" (Art. I, § 1)
2. "the sole power of impeachment" (Art. I, § 2)
3. "the sole power to try all impeachments" (Art. I, § 3)
4. "The Congress shall have Power to. . . . " (Art. I, § 8)
5. "[power to] make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution. . . . " (Art. I, § 8)
6. "The executive power" (Art. II, § 1)
7. "power to grant Reprieves and Pardons" (Art. II, § 2)
8. "power . . . to make Treaties" (Art. II, § 2)
9. "power to fill up all Vacancies that may happen. . . . " (Art. II, § 2)
10. "The judicial Power" (Art. III, § 1)
11. "The judicial Power shall extend. . . . "(Art. III, § 2)
12. "Congress shall have Power to declare the Punishment of Treason" (Art. III, § 3)
13. "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory. . . . " (Art. IV, § 3)

[40] *See* A.H. Fuller, *The Tenth Amendment Retires*, 41 A.B.A.J. 223 (1941).

"Rights" are spoken of at least 11 times on the face of the 26 amendments to the Constitution. Over half of those references are in the "Bill of Rights".[41] The word "rights" in the Ninth Amendment must therefore be read together with its use in the other amendments, and the rights "enumerated" therein.

"Rights" must be protected, and "power" is delegated or reserved for that purpose. "Powers" are exercised at the disposal of "rights" or they are a very part of the "right" itself. Congress or the States do not have enumerated "rights," but the *people* do. Congress and the States have delegated and reserved "powers", respectively, in order to protect those "rights" possessed by the people, but not to "deny or disparage" them.

Congress has only delegated *powers*, but it has no *rights*. That is why Congress is not allowed to add qualifications for its own members. ***See Powell v. McCormick***, 395 U.S. 486, 548 (1969). Congress or the State legislatures

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[41] 1. "right of the people peaceably to assemble" (amend. I)
2. "right of the people to keep and bear arms" (amend. II)
3. "right of the people to be secure in their persons, houses. . . . " (amend. IV)
4. "right to a speedy and public trial" (amend. VI)
5. "right of a trial by jury" (amend. VII)
6. "certain rights" (amend. IX)
7. "right to vote. . . . "(amend. XIV)
8. "right . . . to vote" (amend. XV)
9. "right . . . to vote" (amend. XIX)
10. "right . . . to vote" (amend. XXIV)
11. "right . . . to vote" (amend. XXVI)

do not choose their own members; the *people* choose them.[42]

The people may, therefore, clearly do what the Congress may *not* do. They have the right to choose whomever they wish to represent them, as limited by the requirements of the Qualifications Clause. The Elections Clause (with its Congressional "veto") is not even implicated if a "qualification" is at issue, or if the people have simply chosen to restrict the range of their possible choices among constitutionally "qualified" candidates. It is the latter situation that occurs in the case of voter-initiated term limits or ballot access restrictions.[43]

Ballot access restrictions or term limits enacted through voter-initiated state statutes or state constitutional amendments clearly implicate the Ninth Amendment. The Ninth Amendment is a proclamation of popular sovereignty, and that sovereignty is diluted *only* to the extent that it has been voluntarily *surrendered*. The Constitution, in the Bill of Rights, makes that point explicitly, and it permeates every other part of the Constitution as well.

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[42] While it is true the Constitution delegates not only express, but also certain implied powers, to the federal government, the implication of federal powers must be strongly disfavored where basic liberties of the people are at stake. This is the clear and express command of the Ninth Amendment. "[U]nder the U.S. Constitution, the people have [expressly] reserved only one duty for themselves: the duty of choosing Congress. In a system that takes popular sovereignty seriously, this duty ought to be broadly construed because the Ninth Amendment may require such a construction and the principles of popular sovereignty imply it." Hills, note 33, ***supra***, at 150.

[43] ***See*** § I(D)(3), ***supra*** at 17 (term limits are not "qualifications").

The Constitution explicitly recognizes the right of the people to vote for their members of Congress.[44] The Ninth Amendment clearly says that a "right" enumerated in the Constitution does not negate or depreciate the existence of other rights that are not so enumerated. U.S. Const. amend. IX. If the people have the right to vote for their candidates for national office as they choose, then the people also have the right to voluntarily *restrict* their range of choice because of what they perceive to be a greater good to themselves and in their own best interest. In other words, the people, under the Ninth Amendment also possess the right to limit the incumbencies of their members of Congress, by initiating and then voting to pass term limits or ballot access restrictions in their own states. In this case the people of Arkansas have exercised their right to vote to restrict their own freedom of choice in Congressional elections. This is a right guaranteed to the people by the Ninth Amendment.[45]

The State is the primary guarantor of the people's rights, and it possesses "powers" to protect those rights.[46] The State of Arkansas has a substantial interest in protecting the rights of its citizens.[47] It is precisely in this

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[44] U.S. Const. art. I, § 2, amend. XVII. ***See also*** amend. XIV, XV, XIX, XXIV, and XXVI; ***Oregon v. Mitchell***, 400 U.S. 112 (1970).

[45] The idea of popular sovereignty as enunciated in the Declaration of Independence and embodied in the Constitution clearly upholds such a right. ***See*** the Declaration of Independence, and its use of the word "rights".

[46] ***See, e.g., U.S. v. Edwards***, 745 F.Supp. 1477, 1479 (D.Minn. 1990) ("It is the State, not the federal government, that defines and restores a person's civil rights, even in regard to the federal government").

[47] ***See*** § I(D)(2), ***supra*** at 15-16.

role that the Petitioner State of Arkansas asserts its Tenth Amendment sovereignty on behalf of the voters in that State, and in its own interest. The citizens of Arkansas have asserted "power" on behalf of their own "rights", and the Petitioner State of Arkansas also now comes before the Court as a defender of those rights.

The enactment of Amendment 73 and other measures like it do not usurp, nor do they interfere with, the exercise of the powers delegated to Congress in Article I. As such, Amendment 73 is simply a legitimate exercise of the people's Ninth Amendment retained rights.[48]

C. The Guarantee Clause Ensures The People's Right To Select Their Own Representatives.

The Constitution "guarantee[s] to every State in this Union a Republican Form of Government". U.S. Const. art. IV, § 4. In essence, the Guarantee Clause provides a necessary "constitutional limit on federal interference with state autonomy".[49]

The right of States to control selection of their representatives goes to the heart of the Guarantee Clause.[50] As

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[48] Thus, the Ninth Amendment expressly prohibits reading the enumeration of election rights in Article I (as limited by the three minimum qualifications for the States' representatives in Congress) so as to otherwise deny or disparage the right of the people to control the selection of their own representatives to the Federal Legislature. The Ninth Amendment commands the application of the Tenth Amendment as a rule of construction. *See* section I(C), ***supra*** at 8.

[49] Merritt, note 8, ***supra***.

[50] "[W]idespread agreement exists among scholars and jurists about the core meaning of republican government. Since at least the eighteenth century, political thinkers have stressed

the Court once stated, "[T]he distinguishing feature 'of a republican form of government' is the right of the people to choose their own officers for governmental administration, and pass their own laws". ***In re Duncan***, 139 U.S. 449, 461 (1891). Thus, "[b]y guaranteeing the States a republican form of government, the language of the clause implicitly promises the States sufficient independence to maintain the responsiveness of their governments to popular will".[51]

The Guarantee Clause necessarily applies to both the state and federal governments. In a system of dual sovereignty where more and more power is concentrated in the federal government, ***see New York v. U.S.***, 112 S.Ct. at 2418-19, the Guarantee Clause becomes illusory if the States are denied the power to control the selection of their representatives to Congress. Furthermore, the States, and their people, have an interest in ensuring that the United States itself retains a republican form of government. In ***Gregory v. Ashcroft***, the Court stated that the authority of the people of the States to determine the qualifications of their most important government officials " 'go[es] to the heart of representative government' ". ***Gregory***, 501 U.S. at 463 (quoting ***Bernal v. Fainter***, 467 U.S. 216, 221 (1984)). "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " ***Id.*** (quoting U.S. Const. art. IV, § 4). In ***Gregory***, the Court concluded, "[t]he people of Missouri rationally could conclude that retention elections – in which state judges run unopposed at relatively long intervals – do not serve as an adequate check

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that *a republican government is one in which the people control their rulers.*" Merritt, note 8, ***supra*** at 23 (emphasis added).

[51] Merritt, note 8, ***supra***.

on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma". *Id.* at 472. Similarly, the people of Arkansas have determined that the tremendous advantages of entrenched incumbency make the current election system inadequate as a check on their representatives in Congress. Restricting ballot access to multi-term incumbents serves to level the political playing field. Such provisions are a manifestation of the people's rights to control selection of their government officials which are reserved to the people and the States in the Ninth and Tenth Amendments and guaranteed by the Guarantee Clause.[52]

In the present case, enforcement of the Guarantee Clause would reinforce State sovereignty, and the Court should not refrain from finding a justiciable question

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[52] Historical evidence supports this interpretation of the Guarantee Clause.

> On November 30, 1787, for example, Jasper Yeates delivered a lengthy speech . . . to the Pennsylvania convention. . . . Yeates attempted to answer claims that the Constitution represented "a consolidation and not a confederation of the States." Yeates responded . . . by observing that the states would control both the election of Senators and Representatives and the appointment of presidential electors. He then clinched his argument by referring to the language of the Guarantee Clause. "Lest anything, indeed, should be wanting," Yeates announced,
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> > to assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article, that "the United States shall guarantee to every State in this Union, a republican form of government". . . .

See Merritt, note 8, ***supra***, at 31.

under this clause.[53] As one commentator has stated, "Only by leaving the citizens of each state free to establish and run their own governmental bodies can those citizens achieve Madison's republican ideal of 'a government which derives all its powers directly or indirectly from the great body of the people' ".[54]

CONCLUSION

"When important ideas are forgotten by a republic, the forgetting of them is the reason why the republic lists dangerously in one direction or another. . . . The decline of public confidence in government and the resurgent interest in term limits have got the nation thinking about fundamentals. And not a moment too soon."[55] This brief by the amici curiae States is about fundamentals. It is about the fundamental concepts of federalism and role of the States in the system of dual sovereignty known as the United States of America.

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[53] Although the Court historically has been reluctant to review many Guarantee Clause claims, ***see, e.g., Colegrove v. Green***, 328 U.S. 549, 556 (1946), "neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon state autonomy". Merritt, note 8, ***supra***, at 70-71. Determinations of justiciability are to be made on a case-by-case inquiry. ***Baker v. Carr***, 369 U.S. 186, 211 (1962); ***Reynolds v. Sims***, 377 U.S. 533, 582 (1964). The Court "has been most hospitable to challenges founded on the guarantee clause when those challenges reinforced state autonomy". Merritt, note 8, ***supra***, at 73. ***See, e.g., Coyle v. Smith***, 221 U.S. 559, 565 (1911).

[54] Merritt, note 8, ***supra***, at 25 (quoting *The Federalist No. 39* at 251 (J. Madison) (J. Cooke ed. 1961).

[55] George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* 5 (1992).

The ballot access restrictions enacted by the people of Arkansas are consistent with Article I of the United States Constitution and the fundamental democratic principle, "that the people should choose whom they please to govern them".[56] Regardless of whether ballot access restrictions are classified as regulations affecting the manner of an election under Art. I or as manifestations of powers reserved by the Tenth Amendment, the States and the people have a crucial interest in controlling the selection of their Congressional representatives. The people's rights would be improperly trampled if the Court were to conclude such restrictions were prohibited.

For the reasons stated, the judgment of the Arkansas Supreme Court should be reversed and Amendment 73 to the Arkansas Constitution should be reinstated.

Respectfully submitted,

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August 16, 1994.

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[56] 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876) (remarks of A. Hamilton).

Nos. 93-1456 & 93-1828

In The

Supreme Court of the United States

October Term, 1994

U.S. Term Limits, Inc., Arkansas For Governmental Reform, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumleg,

Petitioners,

vs.

Ray Thornton, Blanche Lambert, Dale Bumpers, David Pryor, et al.,

Respondents.

State of Arkansas ex rel. Winston Bryant, Attorney General of the State of Arkansas,

Petitioner,

vs.

Bobbie E. Hill, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

APPENDIX TO THE BRIEF OF THE STATES OF NEBRASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, KANSAS, KENTUCKY, MASSACHUSETTS, MONTANA, NEW HAMPSHIRE, OHIO, SOUTH DAKOTA, TENNESSEE AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

APPENDIX

To date, fifteen states have enacted ballot access restrictions or term limit provisions affecting members of Congress. All fifteen were enacted through citizen initiatives. For the convenience of the Court, all the state constitutional amendments or state statutes which embody ballot access restrictions or limits on congressional terms are set forth below. A summary chart of these measures and a chart showing certified election returns on their passage are also included (see pp.14-15).

1. Arizona

> Section 18. The name of any candidate for United States Senator from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for two consecutive terms, and the name of a candidate for United States Representative from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for three consecutive terms. Terms are considered consecutive unless they are at least one full term apart. Any person appointed or elected to fill a vacancy in the United States Congress who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this section. For purposes of this section, terms beginning before January 1, 1993, shall not be considered. [Added by initiative measure election Nov. 3, 1992, eff. Nov. 23, 1992].

Ariz. Const. art. VII, § 18 (West Supp. 1993).

2. Arkansas

Preamble: The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

§ 1. Executive Branch.

(a) The Executive Department of this State shall consist of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four year terms.

§ 2. Legislative Branch.

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member

of the Arkansas Senate may serve more than two such four year terms.

§ 3. Congressional Delegation.

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

§ 4. Severability.

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

§ 5. Provisions Self-Executing.

Provisions of this Amendment shall be self-executing.

§ 6. Application.

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all person thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby

repealed to the extent that they conflict with this amendment.

Ark. Const. amend. 73 (Michie Supp. 1993) (held invalid in ***U.S. Term Limits, Inc. v. Hill***, 316 Ark. 251, 872 S.W.2d 349 (1994), ***cert. granted*** by ***U.S. Term Limits, Inc. v. Thornton***, 62 U.S.L.W. 3835 (1994), and ***cert. granted*** by ***Bryant v. Hill***, 62 U.S.L.W. 3835 (1994)).

3. California

§ 25003. Limitation on ballot access.

(a) Federal legislative candidates; ballot access. Notwithstanding any other provision of law, the Secretary of State, or other election official authorized by law, shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot, ballot pamphlet, sample ballot, or ballot label the name of any person, who does either of the following:

(1) Seeks to become a candidate for a seat in the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for the resignation would have served, as a member of the United States House of Representatives representing any portion or district of the State of California during six or more of the previous eleven years;

(2) Seeks to become a candidate for a seat in the United States Senate, and who, by the end of the then current term of office will have served, or but the resignation would have served, as a

member of the United States Senate representing the State of California during twelve or more of the previous seventeen years.

(b) "Write-in" candidacies. Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having such a ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign.

(c) Construction. Nothing in this section shall be construed as preventing or prohibiting the name of any person from appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of subdivision (a), and to that end the provisions of subdivision (a) shall be strictly construed. [Added by Initiative Measure (Prop. 164, approved Nov. 3, 1992, eff. Jan. 1, 1993)].

Cal. Elec. Code § 25003 (West. Supp. 1994).

4. Colorado

§ 9a. U.S. senators and representatives-limitation on terms

(1) In order to broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative of and responsive to Colorado citizens, no United States Senator from Colorado shall serve more than two consecutive terms in

the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). Terms are considered consecutive unless they are at least four years apart.

(2) The people of Colorado hereby state their support for a nationwide limit of twelve consecutive years of service in the United States Senate or House of Representatives and instruct their public officials to use their best efforts to work for such a limit.

(3) The people of Colorado declare that the provisions of this section shall be deemed severable from the remainder of this measure and that their intention is that federal officials elected from Colorado will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid. [Added Laws 1991, p. 2036, Initiated 1990, eff. Jan. 3, 1991].

(Two sections designated as section 9 of article 18 were proposed by initiative submitted to the electorate and approved at the general election of November 6, 1990, effective upon proclamation of the governor, January 3, 1991. This section appears as section 9a and the other as section 9 in the state edition.)

Colo. Const. art. XVIII, § 9a (West Supp. 1993).

5. Florida

§ 4. Disqualifications.

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following office:

(1) Florida representative,

(2) Florida senator,

(3) Florida Lieutenant governor,

(4) Any office of the Florida cabinet,

(5) U.S. Representative from Florida, or

(6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

Fla. Const. art. 6, § 4 (West Supp. 1994).

6. Michigan

§ 10. Limitations on terms of office of members of the United States House of Representatives and United States Senate from Michigan.

Sec. 10. No person shall be elected to office as representative in the United States House of Representatives more than three times during

any twelve year period. No person shall be elected to office as senator in the United States Senate more than two times during any twenty-four year period. Any person appointed or elected to fill a vacancy in the United States House of Representatives or the United States Senate for a period greater than one half of a term of such office, shall be considered to have been elected to serve one time in that office for purposes of this section. This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993.

The people of Michigan hereby state their support for the aforementioned term limits for members of the United States House of Representatives and United States Senate and instruct their public officials to use their best efforts to attain such a limit nationwide.

The people of Michigan declare that the provisions of this section shall be deemed severable from the remainder of this amendment and that their intention is that federal officials elected from Michigan will continue voluntarily to observe the wishes of the people as stated in this section, in the event any provision of this section is held invalid.

This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect. [Enactment ratified Nov. 3, 1992, eff. Dec. 19, 1992.

Mich. Const. art. II, § 10 (West Supp. 1994).

7. Missouri

§ 45(a). [United States Senators and Representatives-term limits]

Section 45(a). (1) No United States Senator from Missouri shall serve more than two terms in the United States Senate, and no United States Representative from Missouri shall serve more than four terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after the effective date of this section. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one-half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). The provisions of this subsection (1) shall become effective whenever at least one-half of the states enact term limits for their members of the United States Congress.

(2) The people of Missouri declare that the provisions of this section shall be deemed severable and that their intention is that federal officials elected from Missouri will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid. [Adopted at general election Nov. 3, 1993.]

Mo. Const. art. III, § 45(a).

8. Montana

1) The Secretary of State or other authorized official shall not certify a candidate's nomination or election to, or print or cause to be

printed on any ballot the name of a candidate for, one of the following offices if, at the end of the current term of that office, the candidate will have served in that office or had he not resigned or been recalled would have served in that office:

(a) 8 or more years in any 16-year period as governor, lieutenant governor, secretary of state, state auditor, attorney general, or superintendent of public instruction;

(b) 8 or more years in any 16-year period as a state representative;

(c) 8 or more years in any 16-year period as a state senator;

(d) 6 or more years in any 12-year period as a member of the U.S. House of Representatives; and

(e) 12 or more years in any 24-year period as a member of the U.S. Senate.

2) When computing time served for purposes of subsection (1), the provisions of subsection (1) do not apply to time served in terms that end during or prior to January 1993.

3) Nothing contained herein shall preclude an otherwise qualified candidate from being certified as nominated or elected by virtue of write-in votes cast for said candidate.

Mont. Const. art. IV, § 8.

9. Nebraska

Sec. 20. Representatives in Congress; United States Senator; filing ineligibility. Any person

who shall have been elected to serve four consecutive terms in the office of Representative in Congress shall not be listed on any official ballot at any primary or general election to seek a fifth consecutive term; and any person who shall have been elected to serve two consecutive terms in the office of United States Senator shall not be listed on any official ballot at any primary or general election to seek a third consecutive term and neither may be listed on an official ballot as a candidate for a period of years equal to the number of years in the term for which that person was last elected as Representative in Congress or as a United States Senator. The term held and being served as the result of an election prior to the effective date of this amendment shall not be included in the number of consecutive terms referred to in stipulating ineligibility to file for election or to be listed on an election ballot. [Adopted 1992].

Neb. Const. art. XV, § 20 (Supp. 1993) (invalidated on state grounds for lack of sufficient signatures on petitions, *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994)).

10. North Dakota

16.1-01-13. Term limits for United States senators and representatives in Congress. A person is permanently ineligible to have that person's name placed on the ballot at any election for the office of United States senator or representative in Congress if, by the state of the term for which the election is being held, the person will have

served as a United States senator or a representative in Congress, or in any combination of those offices, for a least twelve years.

Source: I.M. approved November 3, 1992.

Note: This section was created by an initiated measure approved by the people at the general election on November 3, 1992.

16.1-01-13.1. Term limits for United States senators and representatives in Congress. A person is ineligible to have that person's name placed on the ballot at any election for the office of United States senator or representative in Congress if, by the start of the term for which the election is being held, that person will have served as a United States senator or a representative in Congress, or in any combination of those offices, for at least twelve years. However, if that person is still otherwise eligible to hold the office, the disqualification imposed by this section ceases after two years have elapsed since the disqualification last affected that person's eligibility for placement on the ballot.

Source: I.M. approved November 3, 1992.

16.1-01-14. Statement of intent. In enacting this measure, the people of North Dakota:

1. Recognize that, along with the rest of the people of the United States, we have bestowed certain powers on the state and federal governments, and the governmental power flows ultimately from the people, not to them.

2. Do so in the partial exercise of our duty to elect representatives in Congress, under Article I, section 2 of the United States Constitution, and our duty to elect United States Senators,

under the 17th Amendment to the United States Constitution.

3. Recognize that the United States Supreme Court has never held that the people of a state do not have the constitutional power to establish term limits for federal legislators from their state.

4. Recognize that certain restrictions are placed on our ability to choose federal legislators, such that we could not, for example, elect a 28-year-old to the Senate to require a religious test for a federal legislator.

5. Assert that, aside from the requirements explicitly imposed by the United States Constitution, our power with respect to election of federal legislators is plenary.

6. Note that, under the United States Constitution, we have certain rights to control suffrage in elections, regulating such matters as residency, ballot access, and voting methods. As the possessors of the power to regulate suffrage, we also have the power to regulate certain qualifications of the agents we appoint by exercising our suffrage.

7. Exercise the legislative power we reserved to ourselves in Article III, Section 1 of the North Dakota Constitution.

8. Recognize that, just as the federal Hatch Act [5 U.S.C. § 7324 et seq.] restricts the candidacies of otherwise eligible persons from holding elected office, we have the same salutary purpose as does the Hatch Act, namely preventing an incumbent party from using government power to entrench itself permanently into government office.

9. Are mindful of the United States Supreme Court's statement, in Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528, 551 (1985), that state control of the election process is supposed to be a protection of the state peoples from the national government.

10. Recognize that increased concentration of power in the hands of incumbents has made this state's electoral system less free, less competitive, and most importantly, less representative.

11. Recognize that our interests are best served by having our United States senators and representatives in Congress be mindful of their origins and return to our ranks whence they came.

12. Make the following declarations and historical findings:

a. James Madison, in No. 57 of The Federalist Papers, predicted that the House of Representatives would always be responsive to the will of the people because that house would be bound by the same laws they impose on the people. His prediction was wrong and Congress has arrogated to itself powers not granted to the people, a recent notorious example being the bank of the House of Representatives in which members were allowed to kite checks. His prediction was wrong in that Congress has oppressed the people with laws from which it exempts itself, recent examples including minimum wage, discrimination, occupational safety, and other laws.

b. The appearance of corruption and the lack of competitiveness for entrenched

incumbency seats has lessened voter participation and that is counter-productive to the purposes of a representative republic.

c. Our vital interests in maintaining the integrity of the political process have been harmed by these and other factors. Therefore, term limitation is the best method by which we can insure that our vital interests are guarded.

13. Believe this measure is constitutional and intend it to be so. Therefore, even if a court holds any portion of this measure unconstitutional, thereby substituting its own judgment for that we have expressed in enacting this measure, the Legislative Council shall require the publisher of the North Dakota Century Code to include the text of this measure, in the manner as if not so held but with appropriate annotation, to stand as a testament to our expressed will, and as a memorial to the defiance of that will by whatever court holds this measure unconstitutional. Furthermore, if any part of this measure is held unconstitutional, we intend that the rest of it be deemed effective, to the maximum extent permitted under section 1-02-20.

Source: I.M. approved November 3, 1992.

Note: This section was created by an initiated measure approved by the people at the general election on November 3, 1992.

N.D. Cent. Code § 16.1-01-13, § 16.1-01-13.1, § 16.1-01-14 (Michie Supp. 1993).

11. Ohio

§ 8 Term limitations.

No person shall hold the office of United States Senator from Ohio for a period longer than two successive terms of six years. No person shall hold the office of United States Representative from Ohio for a period longer than four successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1993, shall be considered in determining an individual's eligibility to hold office. [Adopted November 3, 1992.]

Ohio Const. art. V, § 8 (Supp. 1993).

12. Oregon

Section 20. Limits on Congressional Terms. To promote varied representation, to broaden the opportunities for public service, and to make the electoral process fairer by reducing the power of incumbency, terms in the United States Congress representing Oregon are limited as follows:

(1) No person shall represent Oregon for more than six years in the U.S. House of Representatives and twelve years in the U.S. Senate in his or her lifetime.

(2) Only terms of service beginning after this Act [sections 19 to 21 of this Article] goes into effect [December 3, 1992] shall count towards the limits of this Section.

(3) When a person is appointed or elected to fill a vacancy in office, then such service shall

be counted as one term for the purposes of this Section.

(4) A person shall not appear on the ballot as a candidate for elected office or be appointed to fill a vacancy in office if serving a full term in such office would cause them to violate the limits in this section. [Created through initiative petition filed April 23, 1991, and adopted by the people Nov. 3, 1992.]

Note: The lead line to section 20 was a part of the measure proposed by initiative petition filed April 23, 1991, and adopted by the people Nov. 3, 1992.

Ore. Const. art. II, § 20 (1993).

13. South Dakota

§ 32. Term limitations for United States congressman.

Commencing with the 1992 election, no person may be elected to more than two consecutive terms in the United States senate or more than six consecutive terms in the United States house of representatives.

S.D. Const. art. III, § 32 (Michie Supp. 1994).

14. Washington

29.68.015. United States house of representatives-Term limits.

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States house of representatives who, by the end of the then current term of office will have

served, or but for resignation would have served, as a member of the United States house of representatives during six of the previous twelve years. [Enacted by Laws 1993, ch. 1, § 4 (Initiative Measure No. 573, approved Nov. 3, 1992)].

29.68.016. United States senate-Term limits.

No person is eligible to appear on the ballot or file a declaration of candidacy for the United States senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States senate during twelve of the previous eighteen years. [Enacted by Laws 1993, ch. 1, § 5 (Initiative Measure No. 573, approved Nov. 3, 1992)].

Wash. Rev. Code §§ 29.68.015-016 (West Supp. 1994) (held invalid in ***Thorstead v. Gregoire***, 841 F.Supp. 1068 (W.D. Wash. 1994) [now on appeal]).

15. Wyoming

(a) Notwithstanding any other provision of Wyoming law, the Secretary of State or other authorized official shall not accept nomination applications or certify as a nominee or candidate for the office sought, the name of any person, if the following will occur:

(i) The person by the end of the current term of office will have served, or but for resignation, would have served as a representative from Wyoming for twelve (12) or more years in any twenty-four (24) year period to the United States Senate, except that any time served to the United States Senate prior to January 1, 1993,

shall not be counted for purposes of this term limit.

(ii) The person by the end of the current term of office will have served, or but for resignation, would have served as a representative from Wyoming to the United States House of Representatives for six (6) or more years in any twelve (12) year period of time, except that any time served in the United States House of Representatives, prior to January 1, 1993, shall not be counted for purposes of this term limit.

Wyo. Stat. § 22-5-104 (Michie Supp. 1993).

STATES WHICH HAVE ENACTED BALLOT ACCESS RESTRICTIONS OR TERM LIMITS FOR MEMBERS OF CONGRESS

State	Ballot Measure	U.S. House	U.S. Senate
Arizona	Proposition 107	3 terms/6 years	2 terms/12 years
Arkansas	Amendment 4	3 terms/6 years	2 terms/12 years
California	Proposition 164	3 terms/6 years	2 terms/12 years
Colorado	Amendment 5	6 terms/12 years	2 terms/12 years
Florida	Amendment 9	4 terms/8 years	2 terms/12 years
Michigan	Proposition B	3 terms/6 years	2 terms/12 years
Missouri	Amendment 13	4 terms/8 years	2 terms/12 years
Montana	Constitutional Initiative 64	3 terms/6 years	2 terms/12 years
Nebraska	Measure 407	4 terms/8 years	2 terms/12 years
North Dakota	Measure 5	6 terms/12 years	2 terms/12 years
Ohio	Issue 2	4 term/8 years	2 terms/12 years
Oregon	Measure 3	3 term/6 years	2 terms/12 years
South Dakota	Constitutional Amendment A	6 terms/12 years	2 terms/12 years
Washington	Initiative 573	3 terms/6 years	2 terms/12 years
Wyoming	Initiative 2	3 terms/6 years	2 terms/12 years

Source: Term Limits Legal Institute, Washington D.C.

CERTIFIED ELECTION RETURNS FOR BALLOT MEASURES TO ENACT BALLOT ACCESS RESTRICTIONS OR TO LIMIT TERMS OF MEMBERS OF CONGRESS

State	U.S. House	U.S. Senate	Vote Yes (%)	Vote No (%)
Arizona Proposition 107	3 terms/6 years	2 terms/12 years	1,026,830(75%)	356,799(25%)
Arkansas (Amendment 4)	3 terms/6 years	2 terms/12 years	494,326(60%)	330,836(40%)
California Proposition 164	3 terms/6 years	2 terms/12 years	6,578,636(64%)	3,769,510(36%)
Colorado* (Amendment 5)	6 terms/12 years	2 terms/12 years	708,974(71%)	289,664(29%)
Florida (Amendment 9)	4 terms/8 years	2 terms/12 years	3,625,500(77%)	1,097,127(23%)
Michigan Proposition B	3 terms/6 years	2 terms/12 years	2,323,171(59%)	1,629,368(41%)
Missouri (Amendment 13)	4 terms/8 years	2 terms/12 years	1,590,552(74%)	558,299(26%)
Montana (Constitutional Initiative 64)	3 terms/6 years	2 terms/12 years	264,174(67%)	130,695(33%)
Nebraska (Measure 407)	4 terms/8 years	2 terms/12 years	481,048(68%)	224,114(32%)
North Dakota Measure 5	6 terms/12 years	2 terms/12 years	162,150(56%)	129,930(44%)
Ohio (Issue 2)	4 term/8 years	2 terms/12 years	2,897,123(66%)	1,476,009(34%)
Oregon (Measure 3)	3 term/6 years	2 terms/12 years	1,003,706(70%)	439,694(30%)
South Dakota Constitutional Amendment A	6 terms/12 years	2 terms/12 years	205,074(64%)	117,702(36%)
Washington Initiative 573	3 terms/6 years	2 terms/12 years	1,119,985(52%)	1,018,260(48%)
Wyoming (Initiative 2)	3 terms/6 years	2 terms/12 years	150,113(77%)	44,424(23%)
		TOTAL:	22,631,362(66%)	11,612,431(34%)

*Colorado passed term limits in November of 1990. All other term limits measures were approved in November of 1992. **Sources:** Term Limits Legal Institute, Washington D.C.; Offices of Secretaries of State, Election Divisions.